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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 140.

EUGENE W. OSMENT, *Petitioner,*

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR.,
Receivers of the Wabash Railway Company,
a Corporation, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF OF THE RESPONDENTS IN OPPOSITION
and
EXHIBITS.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

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OPINION BELOW.

The opinion of the Court below (R. 510) is reported in 159 S. W. 2d 666 (Not yet officially reported)

JURISDICTION.

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by an act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937, U. S. C. A., Title 28, Sections 344 and 344 (b), to review a judgment of Division Two of the Supreme Court of Missouri rendered in an action brought under the Federal Employers' Liability Act as amended August 11th, 1939, Title 45, U. S. C. A., Sec. 51, 53 Stat. 1404.

QUESTIONS PRESENTED.

1. Has this Court jurisdiction to review the decision in question which was rendered by Division Two of the Supreme Court of Missouri which is not the highest court of the state, when a review of such decision by the Missouri Supreme Court *en banc*, the highest court, might have been had, and there was no attempt made to procure such review?

2. Even if this Court has jurisdiction should it exercise its discretionary power by certiorari to review the decision in question where such decision holds: that the master is not liable for an act of horseplay by his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment, and where liability is predicated on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act.

STATEMENT.

The judgment sought to be brought here by certiorari was rendered by Division Two of the Supreme Court of Missouri. No motion was made by petitioner to have the case transferred to the Missouri Supreme Court *en banc*.

This action was begun in the Circuit Court of Jackson County, Missouri, under the Federal Employers' Liability Act. The plaintiff, petitioner here, recovered judgment in the trial court which was reversed outright by Division Two of the Missouri Supreme Court. The evidence in the case was as follows—Petitioner Osment, a switchman in the employ of the respondents, was standing in respondent's freight house with Chamberlain and Gardner, two members of his switching crew, near a water fountain. Finnell, a patrolman in the Wabash Receiver's Special Service Department, was sitting near the fountain facing the switching crew and about four or five feet from Osment. Gardner was facing Osment (R. 50) and Chamberlain was standing at Osment's right side. While the men were in these positions, and within a few feet of each other, John Stalac, a young man in the messenger department of the Wabash receivers, came through the freight house. He had no business with Osment or Finnell or any member of Osment's switching crew (R. 33, 134). He came up behind Osment, and without indicating what he intended to do (R. 24), put his arm around Osment's shoulder and neck in such manner that Osment could not see who it was. and held it there for from ten to thirty or forty seconds, Osment slipped to the floor in a sitting position and then fell back, striking the back of his head on the concrete floor. He was unconscious for a few seconds and there was a small abrasion on the back of his head and a little blood (R. 49). Stalac took Osment over to the water cooler, washed off Osment's head and put some disinfectant on it. While doing this, Osment and Stalac were talking and laughing over the occurrence and were apparently friendly (R. 49, 50). The Wabash Receivers offered no evidence on the accident and all of the testimony on that phase of the case is that of Osment's witnesses Chamberlain, Gardner and Osment.

Stalac went to work for Respondents as a young boy; he was playful like a big pup, addicted to good natured

horseplay (R. 48). All of Osment's witnesses agree that when Stalac put his arm around Osment's shoulders, Osment did not struggle or cry out (R. 33, 50) and Chamberlain and Gardner, who were looking right at Osment, did not know that he was in any difficulty until he slipped to the floor (R. 33). Even then Gardner thought Osment was shamming (R. 45).

The amended petition (R. 2) after alleging that Stalac was employed by respondents as a messenger, and that Finnell was employed by respondents as a peace officer whose duty it was to protect the property of respondents and protect their employees, charged that Stalac suddenly and without cause or warning seized Osment from behind about his throat and neck in the presence of Finnell and injured Osment. The petition alleged three grounds of negligence: (1) that Stalac was an incompetent and dangerous man for respondents to have in their employ, to respondents' knowledge, and that respondents were negligent in retaining and continuing him in their employ, (2) that respondents owed Osment a duty to maintain a safe place to work and that the retention of Stalac in their employ, knowing his dangerous characteristics, was negligence and ratified his conduct and dangerous condition and approved his assault on Osment, and (3) that Finnell, who knew of Stalac's dangerous propensities, was employed by respondents to protect Osment and other employees from attacks, assaults, etc., and that Finnell who was present when Stalac assaulted Osment, permitted, ratified and allowed the dangerous seizure when with the means at hand and in time he could have stopped and prevented the seizure and have warned Osment of Stalac's presence and of the impending seizure in time to have prevented the same and have prevented the resultant injuries after the peril and seizure arose.

The first two allegations of negligence are based on the retention of Stalac, the third on Finnell's failure to act after Osment's peril was known by Finnell to be im-

minent. The third theory of recovery went out of the case on the court's refusal to give petitioner's Instruction 3 (R. 297).

The answer was a general denial.

SUMMARY OF ARGUMENT.

1. This Court does not have jurisdiction to review the decision in question because it was rendered by Division Two of the Supreme Court of Missouri and was not rendered by the highest court of that state in which a decision could be had.

2. Even if this Court has jurisdiction, the petition for certiorari should be denied because the decision of Division Two of the Missouri court, in holding that a master is not liable for an act of horseplay of his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment and where liability is claimed on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act, is not contrary to but is in accord with the applicable decisions of this Court.

ARGUMENT.

I.

This Court Does Not Have Jurisdiction.

Section 237 (b) of the Judicial Code restricts the authority of this court to review decisions of state courts to those causes wherein judgment has been rendered "by the highest court of a state in which a decision could be had."

The judgment sought to be reviewed here was rendered by Division Two of the Supreme Court of Missouri. The losing party there (petitioner here) made no application to transfer the cause to the Missouri Supreme Court *en banc*, although the power of said Division Two to make such transfer on such application exists under the second clause of Section 4 of the 1890 Amendments to Article VI of the Missouri Constitution. Section 1 of said Amendments provides that the Supreme Court shall consist of seven judges and shall be divided into two divisions, Division One to consist of four judges and Division Two to consist of three judges, and that causes may be transferred from Division to the Court as provided in Section 4.

Section 4 of said amendments is as follows:

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; *or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision*" (Italics ours).

Under said provisions of the Missouri Constitution, the judgment rendered by Division Two was not rendered

by the highest court of Misssouri in which a decision could be had.

Gorman v. *Washington University*, 86 L. Ed. 895, decided April 27th, 1942.

While the first clause of Section 4 affords to the losing party the privilege of a transfer as a matter of right when certain grounds exist, the last clause provides for such transfer whenever the division shall "so order." Rule 24 of the Missouri Supreme Court is as follows:

> "A motion to transfer a cause under the provisions of the Constitution from either division to Court *en banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23."

Under said constitutional provisions, said rule and the decisions of the Missouri Supreme Court, a division of said Court has the power, and it is the practice to transfer a cause to the Court *en banc*, on the application of the losing party, either on the mandatory grounds provided for in the first clause of said Section 4 or on other grounds appealing to its discretion under the last clause of said section.

In *Edward L. Scheufler, Supt. of the Insurance Dept.*, v. *Manufacturers Lumbermens Underwriters*, The Missouri Supreme Court *en banc* in a *per curiam* opinion decided July 7, 1942, not yet reported (see Exhibit 1 in Appendix hereto, the originals of all exhibits therein, duly certified, being filed with the clerk of this Court), in speaking of transfers to the Court *en banc* under the last clause of the above constitutional amendment, *i. e.*, the provision for discretionary transfers, said:

> "Under the last clause of this section either division, on *application* or its own motion and for reasons deemed sufficient *though not enumerated in the section* may order a cause transferred to the court *en banc* (Italics ours).

Exhibits 2 and 3, hereto attached, duly certified by the Clerk of the Supreme Court of Missouri, disclose that in the cases of *A. S. King et al., Trustees,* v. *Kansas City Life Insurance Company* and *Ed. L. Klotsch* v. *P. F. Collier & Sons,* Division Two, after decision by it, transferred said cases to the Court *en banc* on motions by the losing parties therein where none of the mandatory grounds of transfer provided in the first clause of the aforesaid Section 4 existed. There were no opinions in said King and Klotsch cases on said motions to transfer, but said exhibits disclose: 1. That no federal question was involved and no Judge of Division Two dissented from the opinion in said Division in either case, and, 2. That motions to transfer to the Court *en banc* were filed, said motions were based on discretionary grounds and not on any mandatory ground specified in the first clause of said Section 4, and that said motions to transfer were sustained by said Division.

Divisions of the Missouri Supreme Court rarely write opinions on motions to transfer but in examining the last few volumes of Missouri cases in the Southwestern Reporter, we find the following cases went to the Court *en banc* although they were decided unanimously in division and no federal questions were involved.

Young v. *Hilmer,* 154 S. W. 2d 87.

Troost Avenue Cemetery Co. v. *Kansas City et al.,* 154 S. W. 2d 90.

From the wording of the last clause of the constitutional provision itself it is clear that a Division has the power to transfer upon any ground addressed to its discretion. In the *Scheufler case, supra,* the Court so declares, and the King and Klotsch cases are typical examples of the frequent exercise of such power.

Under the decisions of this Court there is no authority for the issuance of certiorari to a state court until all possibilities of review by the highest court of the state have been exhausted.

In *Gorman* v. *Washington University* (*supra*), this Court said:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. *Fisher* v. *Perkins*, 122 U. S. 522; *McComb* v. *Commissioners*, 91 U. S. 1, 2; *McMaster* v. *Gould*, 276 U. S. 284; *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186; *Stratton* v. *Stratton*, 239 U. S. 55; *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116; *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339."

In *Andrews* v. *Virginian Ry. Co.*, 248 U. S. 272, 275, this Court said:

> "It is true that, under the law of Virginia, in a case like this the power of the court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the *existence* of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by the court of its rightful authority. That this is true would seem to be demonstrated by considering that if it were not so, a judgment of the state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse, thus, in substance, depriving each court of its power, and begetting the possibility of conflict and confusion" (Italics ours).

In *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116, 123, this Court said:

> "And although the Supreme Court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.
>
> "We must decline to hold that it affirmatively appears from the record that a decision *could not have been had* in the highest court of the state, and this being so, the writ of error cannot be sustained. *Fisher* v. *Perkins*, 122 U. S. 522" (italics ours).
>
> See, also, *Matthews* v. *Huwe*, 269 U. S. 262, 265.

Since the record fails to disclose that petitioner by motion or by any other means has exhausted his possibilities for review by the Missouri Supreme Court *en banc*, the judgment sought to be reviewed is not the judgment of the highest Missouri court in which a decision could be had. We, therefore, urge that this court has no jurisdiction to review this decision and the petition for a writ of certiorari should be denied.

II.

Even If This Court Has Jurisdiction the Petition for a Writ of Certiorari Should Be Denied.

The decision of the Missouri court is that a master is not liable under the Federal Employers' Liability Act for an act of horseplay of his servant, known to be addicted to horseplay, when committed outside the scope of his employment and where liability is predicated on the theory that he retained a dangerous servant in his employ and on the theory that the master failed to protect another servant from such an act. That decision is in harmony with the following applicable decisions of this court:

In *Davis* v. *Green*, 260 U. S. 349, an employee of a railroad, known to be dangerous, while acting outside the scope of his employment, shot and killed another employee of the railroad. The theory of recovery under

the Federal Employers' Liability Act was the employment of a dangerous man. This Court in denying liability said:

> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to futher the master's business or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies."

After the Green case, the plaintiff in *Atlantic Coast Line* v. *Southwell*, 275 U. S. 64, seeking to avoid the effect of the decision of this Court in the Green case, based his right to recover under the Federal Employers' Liability Act for the death of an employee caused by another employee acting outside the scope of his employment, on the employer's failure to prevent the death where the master knew of bad feeling between the employees. The Court in denying the right of recovery said:

> "* * * In view of the decision in *Davis* v. *Green*, 260 U. S. 349, 67 L. Ed. 299, 43 Sup. Ct. Rep. 123, the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied upon its *failure to prevent the death.*
>
> * * * * * * *
>
> "It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yardmaster, knew that Southwell, the man who was killed, on previous occasions had used threaten-

> ing language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him, 'Cap., all I want to do is to ask Southwell to lay off of me and let me alone,' and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him he might bring about unpleasant consequences; that Fonvielle left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separating them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this."

The Green and Southwell decisions completely dispose of petitioner's contentions here that there is liability at common law for (1) the retention of a man known to be addicted to horseplay where his act of horseplay causing injury was outside the scope of his employment and (2) failure to protect against such an act of such a man.

Petitioner seeks to enlarge the master's common law duty to protect Osment from Stalac's act outside the scope of his employment, by claiming that the master here had assumed the duty of protection against acts of an employee outside the scope of his employment, by creating a special service department. His petition (R. 2) does not plead the rules of the special service department by which it is erroneously claimed such an assumed duty arose. In Missouri, where it is sought to enlarge the

master's common law duties by rules, the rules must be pleaded which was not done. *Nivert* v. *Wabash R. Co.*, 232 Mo. 626, *Kirkland* v. *Bixby*, 282 Mo. 462, and *Martin* v. *Wabash Ry. Co.*, 325 Mo. 1107.

Further, the first and second grounds of negligence alleged in the petition, as set out on page 4 of this brief, are based on the retention of Stalac. The third ground of negligence, see this brief page 4, which is based on Finnell's failure to act, with time, means and opportunity at hand to prevent the injury after Osment's peril arose, was not submitted to the jury (R. 297) and petitioner took no appeal from the action of the trial court's refusal to submit. Also we contend that the rules should not be interpreted as raising a duty to Osment beyond that imposed by the common law and were never intended for that purpose. They were the rules of a separate department and Osment did not know what they were (R. 135). We also contend that Furnell's failure to act was not the proximate cause of Osment's injury. Osment's witnesses agree that Osment did not cry out or struggle, he did not change appearance until he dropped to the ground, and there was nothing in his actions or appearance that indicated that he was in any trouble or difficulty until he dropped to the ground (R. 33, 44, 45, 50).

But regardless of these contentions, there is no liability here. In *St. Louis & S. F. Ry.* v. *Mills*, 271 U. S. 344, it was contended that because the Railway Company furnished a guard to protect an employee on his way home during a strike, that the Railway Company was liable for the employee's death caused by one of the strikers in the presence of the guard. This court held that there is no duty growing out of the relationship of employer and employee requiring the employer to guard the employee, and that the fact that the employer voluntarily provided some protection against apprehended danger did not give rise to an inference that it undertook to do

more. The Court further held that it would not do for the jury to speculate on what would have happened if additional guards had been present. In the course of its opinion this court said:

> "* * * There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work; or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnished more protection to the decedent or its other workmen 'than it actually did furnish.'
>
> "The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence."

Thus the Green, Southwell and Mills cases, decided by this court, establish: (1) that the master is not liable for the assault by a known dangerous employee upon another where the act is not committed in the scope of the dangerous employee's employment or in furtherance of the master's business; (2) that even though the master has knowledge of the dangerous characteristics of an employee, and even though he may anticipate that those characteristics will bring about a situation where someone is apt to be hurt, the master is under no duty to prevent or protect against an act which was not done in the course of the master's business; (3) that even though the master may anticipate danger to the employee from the acts of others, either not employees or employees acting outside the scope of employment, and even though the master may assume some duty to protect against those acts, that assumption does not make the

master an insurer, or require him to give more protection than he has actually assumed to give.

Petitioner cites *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, as authority for the proposition that a master has a duty to control his servant while acting outside of the scope of his employment. The liability in that case was not predicated on the duty of a master toward his servant, but was based on the duty of a railroad toward members of the public who may be lawfully using the street. Briefly the facts were as follows:

For a period of several years the defendant railroad had given its express consent that workmen, returning home at the close of the day's work, might take home for firewood odd pieces of bridge timber, ties, etc., which were left over after repairing the road. The railroad had consented that these odd pieces might be thrown off the moving train at points nearest the homes of the respective men, with the admonition that the men must be careful not to hurt anyone in throwing the wood off. Plaintiff was employed in the shop of the railroad and had finished his day's work and was walking home along the street when a piece of timber was thrown from the train, striking and injuring plaintiff after it rebounded on the street.

The question for consideration was, as stated in the opinion page 140, "whether the company was guilty of an omission of the duty which it owed the plaintiff, as one of the public lawfully using the street where the track was." Although the plaintiff was employed in the defendant's shops, yet, at the time of the injury, he had finished his work and was walking along the street toward his home and his status was that of "one of the public lawfully using the street."

The opinion of the Court in holding the defendant liable is not controlling here for a number of reasons, to-wit: (1) It was decided prior to the *Green*, *Southwell* and *Mills cases*, *supra;* (2) it did not arise under

the Federal Employers' Liability Act, nor did it involve the relation of master and servant between plaintiff and defendant; (3) it involved the duty of a common carrier to persons using public streets and any reference to private property is dictum; (4) express consent was given by the railroad for the act done; (5) it was based on a practice or custom which was neither pleaded, proved nor relied on in the case at bar; and (6) although decided in 1897, it has never been cited by any United States court as upholding the doctrine contended for by the plaintiff here.

The decision of Division Two of the Missouri Supreme Court is in harmony with the *Green, Southwell* and *Mills cases, supra,* decided by this Court and the petition for a writ of certiorari should be denied.

Conclusion.

We respectfully submit that this Court has no jurisdiction to review the decision of Division Two of the Missouri Supreme Court and further that even if it has jurisdiction the Missouri decision not only does not conflict with the decisions of this Court but is in accord with them, and the petition for certiorari should be denied.

Respectfully submitted,

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